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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON

In Re: TFT-LCD (Flat Panel) Antitrust Litigation.) NO. M 007-01827 SI

San Francisco, California
Friday, December 9, 2011

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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P R O C E E D I N G S

DECEMBER 9, 2011 **9:14 A.M.**

THE CLERK: Calling MDL 01827, In Re TFT-LCD.

(Pause in proceedings.)

THE COURT: Counsel, have you stated your appearances already?

MR. ALIOTO: We have written them, Your Honor.

THE COURT: All right.

There are two motions on today. One is defendants' motion to decertify the indirect purchaser classes or, in the alternative, for summary judgment.

The second motion is defendants' motion to alter or amend the indirect purchaser classes to avoid overlap definitionally. I am inclined to grant the second motion and deny the first, but I will be glad to hear anything anybody wants to add.

MR. BRIAN: Your Honor, Brad Brian for LG Display. I will argue the first motion.

THE COURT: That would be the global --

MR. BRIAN: The motion to decertify, yes. And with the Court's permission, we have a chart we want to put up. It comes directly from our brief, page 8 of our opening brief.

In our motion we talk about four bases. We talk

about ascertainability, notice, impact, and damages, each of which we believe provides an independent basis to decertify.

What I'd like to do is focus most of my time on the ascertainability and notice issues which we think are related, and we think are fatal to the class.

I think what everybody has recognized, I think from the start of this case, is that ascertainability and notice were going to be major problems.

And, Your Honor, when you certified the class initially, you relied expressly on representations by the plaintiffs that they would solve the problem of ascertainability by, one, adding new defendants -- which they then failed to do in a timely manner -- and through model numbers and the like by being able to determine the class members had, in fact, purchased products with the panels manufactured by the defendants. They have failed to do that. They have failed to do that.

Now, this chart shows -- this comes directly from their own expert, Janet Netz. It's undisputed that she has found in her report that large percentages, large percentages of class members bought products with panels that were not manufactured by the defendants. And those are the percentages.

For monitors you'll see that there's only one year, 2004, where there's less than 5 percent. We have years as much as 43 percent of the products contain panels manufactured by

non-defendants. Notebook is not quite as bad, but 26.2, 22.3, 14. Again, only four years less than 5 percent. And we have the percentage for TV.

What have they done to try to solve that problem? What they did is, in opposition -- essentially, opposition to this motion to decertify they came forward with what we believe is an untimely, inadmissible expert declaration of John Metzler who works for the same company -- he's the managing director or managing partner of ApplEcon. He provides expert assistance to Janet Netz and others of the testifying colleagues.

We have made a motion to strike that on the grounds that it's untimely, inadmissible expert testimony.

They claim it's summary witness. And we don't think it makes that standard, but I'm going to set that aside because I think it's inadmissible for any of those reasons because they haven't -- the documents being relied on are not admissible. They include websites and the like.

But even if you credit, even if you credit Metzler, the best you can get from Metzler is a reordering, a narrowing, a substantial narrowing of the class, because Netz, while she concedes -- while Dr. Netz concedes that large percentages of the class members purchased products without the defendants' panels, she has no way of determining which class members purchased products with the defendants' panels and which ones purchased product without the defendants' panels. No way.

So Metzler comes forward in his declaration and he comes up with I'll call it two and a half methods. I, frankly, can't figure out one of his methods at all. I don't think it adds anything.

But, he has this brand model method where he identifies something like 9,000-plus models, and he says that he can determine that 60 percent, 60 percent have panels manufactured by the defendants. 60 percent.

And then in another model he calls the brand specific model, he says he's able to trace some of the direct purchasers, HP, Dell, Apple and two others. And he says with those he can determine to a hundred percent certainty which of those contained panels manufactured by the defendants.

So I would respectfully urge the Court that we think the class needs to be decertified for all the reasons we've argued.

But, at worst for us, the Court needs to narrow the class either by knocking out the 40 percent, if you're going to credit Metzler at all, by knocking out the 40 percent and narrowing the class or certifying the class to include only those products purchased from the direct -- purchased by consumers from the direct purchasers that he's able to identify contain panels manufactured by the defendants.

Because, absent that, we have a situation where large -- we know that large, large percentages of these class

members bought products with panels that were not manufactured by my client or any of the other defendants. And it's not a "it's close enough." It's not close enough here, and Mr. Metzler's declaration admits that.

Now, I have problems with Mr. Metzler's declaration, but I have more problems with the fact that for a year or so you have been ordering the plaintiffs to come forward with information on how they're going to do this, and they have not done it.

Last time we were here the issue of notice came up. And you turned to one of the plaintiffs' counsel who was standing right here next to me and you, I'll say, requested them to draft up a notice that would go out to the class members so that the class members could decide whether to opt in or opt out so that we would have adequate res judicata protection. I thought you suggested that they give that to us in advance.

We have not seen it. I thought I might get it this morning. I didn't get it. And the reason, I think, we haven't gotten it is because it's impossible to do for precisely the reasons that I've identified, that they simply cannot ascertain who purchased product with panels manufactured by the defendants.

And so I'll leave that issue for now and reserve some right to respond, but with all respect to Your Honor's

tentative I think this is a fatal problem. And I think that they have to figure out a way with the Court to cure it. And Metzler is a problem of admissibility.

But, as I say, for us, as I was thinking about this last night, the worst for us I think -- because I think you ought to decertify the class. But the worst is it has to be narrowed substantially, has to be narrowed or I think we have a fatally-defined class. I really respectfully submit that to Your Honor.

The two other issues are impact and damages. I can -- I would say that in the -- in their opposition brief the plaintiffs argued that we had not filed a Daubert motion.

We have filed a Daubert motion challenging the admissibility of their experts. And we deal with some of the issues that impact, impact, if you will, and we provided a notice to Your Honor because I'm happy to argue impact now. I'm happy to argue damages now. I'm also happy to defer it until Your Honor has a time to review the Daubert motion, and discuss those together.

I'll do whatever Your Honor wants.

THE COURT: Well, the Daubert motion hasn't been heard yet.

MR. BRIAN: I understand that, Your Honor.

So, on impact, let me just say this. The Courts have struggled with the issue of impact in indirect purchaser

classes. There are some courts that have certified classes. I recognize that. There are other courts that have not.

There are courts in this building that have rejected the precise -- I would argue, the precise models that have been proffered to Your Honor as the basis for class certification.

Dr. Netz has been excluded by judges in this courthouse, and Dr. Netz's modeling has been rejected as a basis for class certification by judges in this courthouse.

Since the time you certified the class, evidence has developed which we think shows, without a doubt, that they have not met the test.

Dr. Netz testified under oath at her deposition that her first model does not demonstrate, for example, that everybody who purchased in 1999 suffered an overcharge.

She comes back with a second model. And what that second model shows is that in 2001, the direct purchasers paid no overcharge at all and, in fact, paid less.

Their response to that is to talk about economic theory or economic reality. And I have problems with that in the following respects.

One, in both *Graphics Processing* and *Flash Memory* the courts rejected precisely that sort of analysis.

As Judge Alsup said in Graphics, even if the expert's description of the industry is accurate, it does not suffice on its own as a method of demonstrating impact to the specific

direct purchasers at issue here through common proof.

This is particularly problematic here. It's not even clear that -- other than her modeling exercise, it's not clear that Dr. Netz offers any expertise about the industry. And by that I mean her expertise is the modeling.

And if the model doesn't meet the standard of the general formulaic proof that is required to show impact, she doesn't -- she can't supplement that. She can't fill the gaps by providing some unique expertise that she does not have.

The problem is made even worse when you look at the passthrough -- and this we do talk about in the downward motion. But what she really essentially does is she assumes that there is a passthrough. She ignores the evidence where direct purchasers -- there's been testimony that people did not always pass through. There were all kinds of reasons that affected the prices that were charged through the consumers. But her model assumes it.

She does nothing to deal with if there was a price increase what caused it. Was it caused by this particular component? Or was the price increase caused by the increases in the prices of other components? Her model does nothing to address that.

Now, all -- one thing she does admit and one thing that's undisputed in this case is we're talking about thousands and thousands of different configurations of models and parts,

all of which can affect the price that is passed through, or not, to the consumer. Her model does not address that. So under the case law that we have submitted, we think that her model does not meet it.

Then she gets -- then we get to the fluid recovery problem on damages. And the approach that they have utilized runs directly into what's prohibited in the Ninth Circuit in the *Hotel Telephone* case.

Because they are using an averaging system that will have the effect of providing damages to people that were not injured. Period.

And in the Supreme Court case, in the *Dukes* case the Supreme Court made clear that we have a right to defend the individual claims. You cannot use a class action procedure to essentially run amuck and run afoul of the Rules Enabling Act and prevent us from defending ourselves against individual claims.

The plaintiffs are upfront about it. They say that's just a post administrative ministerial act. It's not. And that's what the Supreme Court makes clear in *Dukes*. You can't solve the problem by assuming impact, assuming passthrough, and then say they'll deal with it at the administrative side of it. That's not the way you solve the problem.

So we think that the evidence that has developed since Your Honor certified the class reveals how deficient the

class is. Both under impact, under damages, and, most importantly, as I started, under ascertainability and notice.

I would like some time to respond, if I could, Your Honor. Thank you.

THE COURT: Mr. Corbitt.

MR. CORBITT: Thank you, Your Honor. Craig Corbitt for the indirect purchasers.

I hesitate to say this because I don't want to cast aspersions on opposing counsel, particularly since he is new to the case, but there is an old book called *How to Lie With Statistics*. And this chart is a good example of the problem that that book points out.

As Your Honor said in her class certification order, the defendants have an overwhelming market share. And the fact is, if you add a column to the end there and put total for the entire period, according to revenue, the numbers would be 2.6 percent for TVs were not sold by the defendants, 6.8 percent for notebooks were not sold by the defendants, and 12.1 percent for monitors were not sold by the defendants.

THE COURT: When you say "total," what do you mean? If you average this?

MR. CORBITT: For the entire class period, if you take the revenues, the sales throughout the class period, then the percentages of the market defined that way that the defendants sold were 97.4 percent of TVs, 93.2 percent of the

notebooks, and 87.9 percent of monitors.

And this is what we said on class cert. I mean, we've refined it by a few tenths of a percent in each of those categories, but it is the same thing.

The market share is overwhelming. And, of course, the reason for that is, hardly any of these things were sold in 1999 and 2000. The market was just getting off the ground. You have to get into '01, '02, and especially '03, '04, '05. Those are where the big sales are.

So these numbers and this chart, I respectfully submit, are very misleading. And the thing that needs to be focused on in terms of the class as a whole are, what were the market shares of the defendants during the class period? And, as you held in your class certification order, or noted, the market share of the defendants was overwhelming.

That is still the case. That hasn't changed. I mean, the defendants have quarreled with a lot of things in this case, but the basic parameters of what the sales were and what they controlled of the market, they have not and cannot challenge because it's from their own numbers. Or from Display Search, which is a service they all subscribe to. Those were the sources of it.

So all of the predominant common issues that Your Honor identified before, when you certified this class, are still there, when I argued this motion before you two years

ago.

The overwhelming one, of course, is the conspiracy and also the common impact from the -- from the effect of the direct purchasers and then the indirect purchasers on the cartel.

And I think your Honor properly recognized that a couple of days ago when you issued the order denying the motion on the *Associated General Contractors* issue on the 14 states. That was exactly right.

Now, the key in terms of ascertainability, which is an issue that they are focusing on, obviously, primarily now, is this class is objectively ascertainable. And that is the test under the law and the test that's been applied uniformly in the cases that we cited.

This is not a situation where this is any subjective element as to who is in the class and who isn't. Okay. It is a physical product. It gets incorporated into another product. It then gets sold.

So at some level it is possible for every single product to be identified if you open the box or did something, which, frankly, we think is an unreasonable burden to impose on class members or on the class, given the share of the market the defendants have.

But it is highly likely, highly likely, given the market shares, that the products that any plaintiff class

member purchased during the class period is going to have contained a defendant panel. It's 90 percent likely.

And we don't have to establish, I would submit, under the law, who the class members are, at this stage of the case, to have a class certification. We don't have to establish that it's a hundred percent of the class members, in fact, bought something. We don't have to do any of that. And we cited cases, the *SRAM* case.

Judge Wilken denied a motion to decertify on exactly the basis that there was -- based on the market share that the defendants had. And that was a case where it was far more difficult to figure out what product the SRAM was in than this case.

There's Judge Walker in the *Blue Sky Beverage* case, other cases from Judge Henderson and Judge White that we've cited, none of which were extinguished by the defendants in their opposition.

Now, the thing that we said before when the class was certified, that turned out not to be as we expected, was that the defendants would have information and the industry would have information that would allow the ready identification of all of the products in which the flat panels were contained.

The defendants say they don't keep that information, all right. The third-party intermediaries, the ODMs, OEMs. Some of them do. Some of them don't. We've got a lot of

those, as I'll explain in a minute. But we don't have all of it.

Well, this is the classic situation under *J. Truett Payne*, under *Bigelow*, *Story Parchment*. There's an antitrust violation that's been committed. There's a cartel that was in effect over a long period of time. And we don't have perfect proof of everything that in an ideal world we would have in order to solve this issue.

But, respectfully, that's the defendants' problem. That should not be the plaintiffs' problem. You don't throw out the baby with the bath water because you can't tell exactly who the 10 percent are that may have bought a product that did not contain the panel. That would be a totally inappropriate remedy.

Now, we answered interrogatories that they served six or eight months ago, and we gave them a list of thousands of products that we know contain these panels from records we got. We recently supplemented that list. We gave them thousands more.

Mr. Metzler's declaration, which certainly was not an expert declaration, he did that entirely under the supervision of my office, my partner Ms. Zahid in particular. It was a compilation of the information that we had.

And he lists, again, and comes up with many, many more, the models that we, in fact, were able to determine with

100 percent certainty are in the class.

And he has a whole extensive other list where, based on comparing the sales of the defendants to the ODMs or OEMs that they have product, and comparing purchase lists and so forth, were able to determine that it's 95, 98, 99 percent likely that the class member would have bought something containing that panel because the product that was manufactured, 99 percent of them contained defendants' panels. Okay.

I think it's admissible, but it's not something that should even matter now. We don't need -- in order to prove up this case and to prove the requirements of Rule 23, we don't need the report from Mr. Metzler or any particular person saying that here are all of the model numbers.

We think that we -- that that becomes relevant when we come to the point of a claims form and when the -- when the money is actually paid out.

We've also identified entire categories where everything was made with the defendant panels. All large TVs over 27 inches, all Sony 14-inch notebooks, all Apple products, all Hewlett-Packard, 15 percent notebooks, and any others where identification is easy because there is a sticker on the back or, in the case of Dell notebooks, you can go in the system folder and have a drop-down menu and figure it out.

And out of all this there were only a few hundred

models out of these, I think, nearly 10,000 that were looked at that did not contain defendant panels, which is entirely consistent with the market share evidence.

So we have done the due diligence on this. We did as much as we could do. We're still trying to do it. We certainly did not sit around like the defendants claimed and not to anything and ignore, because, you know, we certainly understood Your Honor's -- what Your Honor said last time. And I remembered what I said and what was said and what we said in the briefs. And we have made, I submit, every reasonable effort that we could to address this.

Now, the standard of proof for determining whether someone is a member of the class or not, I submit at the appropriate time, is not beyond a reasonable doubt.

You know, this is a civil case. It's a preponderance of the evidence standard. If somebody bought a television, flat-panel television manufactured by Sharp, for example, and you know, Sharp may have 2 percent of their televisions that contain somebody else's panel or a non-defendant panel, the odds are so overwhelming that the particular class member is going to have a product containing that panel, that, I think, should be enough.

But, more importantly, it's not even the defendants' issue, at that point, because I certainly take issue with the assertion that under the Wal-Mart case or anything else, that

we need to go through and do a person-by-person calculation of what the damages would be.

Even if that were true, of course, individual damage issues never defeat class certification. That's a standard law in price-fixing cases, as long as you have the overwhelming common issues of conspiracy and impact, which we do.

But we intend to calculate damages on a class-wide basis. We have two experts now, Dr. Netz and Dr. Comanor from UCLA.

By the way, in case I forget, Dr. Netz's testimony was never excluded. There has never even been a Daubert motion filed against her until the day before yesterday. The Court may choose to accept it or not accept it, but it's never been excluded.

Our experts estimate that damages based on the total volume of the commerce in this country that went into the indirect purchaser products of the three categories at issue, something like -- I'll just give a round number -- 20 billion and a round estimate of 10 percent, so the damages are $2 billion, actually a little more than that in both of their -- in both of their cases.

And we think that it's perfectly appropriate to give a number for the class as a whole and get a -- a judgment entered against the defendants for the class as a whole.

And I base that in part on the ABA model jury

instructions in civil antitrust cases. This was instruction 7, Class Damages. And the ABA, of course, is not known for bending things too much toward the plaintiff side of things.

But it says -- I'm going to quote, Plaintiff is seeking to recover damages on behalf of a class of purchasers. To award damages for the class, you need not determine the overcharge paid by each class member with precision.

It is sufficient for you to determine the average overcharge paid by each class member or estimate the overcharge paid by each class member so long as the average or estimate is based on evidence and reasonable inferences. You may not engage in guesswork or speculation, et cetera.

So the defendants -- we're going to put in evidence at this trial that the defendants caused damages to the indirect purchaser class, as Your Honor has defined it, in this country, of well over $2 billion.

At that point, if the jury agrees with us, or whatever number that they do, we think judgment should be entered, and it no longer, really, is the concern of the defendants who gets to share in that $6 billion, hypothetically, minus the settlements we have.

It's really not their concern, I would submit. And, certainly, the fact that the class cannot be ascertained with 100 percent precision, at this point, is not something under any case that they've cited that should defeat class

certification.

On impact, just briefly, as I mentioned, we think Your Honor got it exactly right on *Associated General Contractors*. And the presumption of impact under cases like *Bogosian*, the *Rubber Chemical* case here from Judge Jenkins, there are many, many others and, of course, under the Cartwright Act and the various state laws that we're pursuing the case under provide for a presumption of impact in price-fixing cases.

Now, it is just simply not the case that the experts just rely on economic theory for that. They did an enormous amount of empirical work as even the defendants' experts acknowledge. And the defendants' experts quibble with the results of that and say they should have made different assumptions.

But it's interesting, even the defendants' -- I'll call them two main experts, I think. Dr. Carlton, who was their expert principally on liability and the amount of the overcharge, he says, well, you know, this conspiracy, I don't see how it ever could have been effective in this market, and they met for six years but, you know, didn't really accomplish anything but, you know, I've done an alternative way to calculate what the overcharge was, you know, and that's a congregate of what they're talking about, but I can see how you could get to 1 percent.

That's basically his opinion. All right.

And then Professor Snyder, who you recall was their expert on class certification and submitted some material in connection with this motion, well, you know, he's still saying I don't see how you could ever figure this out because the distribution chain is so convoluted, et cetera, but if someone were to force me to do something, I could concede that 50 percent -- I think he said 48 percent -- of the overcharge was passed through to consumers. He even has a chart in his report.

So if you put these things together, they're conceding there is over a hundred million dollars of damages just even with those, we think, unreasonably low estimates in this case.

And, you know, it's done without any attempt to say, well, I need to know who is in the class or who's not before I can even render an opinion on that, or anything like that.

So, obviously, even they concede that it could be done.

I think, Your Honor, this is a classic situation of the defendants who are, in LG's case at least, you know, confessed felons, price fixers, of trying to throw the baby out with the bath water and say that, well, because there's some people that we can't figure out, let's just decertify the class and then we can avoid paying anybody, despite their promises on

restitution and so forth. And I think that's entirely inappropriate.

Now, so that's what I have to say on the motion to decertify. If you want me to address the other motion now or wait --

MR. BRIAN: I'm going to respond, if I may, Your Honor.

THE COURT: Let's do the second one second, although I do have another matter on calendar.

MR. BRIAN: I know. I'll try to it keep it brief, Your Honor. Obviously, this is an important motion to us.

Your Honor, at the hearing on July 14th in 2010, you said in response to a comment by Mr. Scarpulla that you were glad he was going to address the issue of ascertainability because, quote, I think there's substantial merit to the view that they ought to be able to tell who's in, meaning who's in the class.

And they said in their brief that they would do two things. They said that, typically, they can determine that based on the model number alone, because most models -- I'm quoting -- because most models contain panels made by a single manufacturer.

They then said -- and I'm quoting -- Plaintiffs will obtain information from the OEMs identifying models using LCD panels made by non-defendants, and serial numbers of units with

panels made by non-defendants for the rare model that used panels from both defendants and non-defendants.

In your order, you said -- you relied on that, and you said, in making your order, that the plaintiffs state that they will obtain information from the OEMs, identifying models using LCD panels made by non-defendants, and the serial numbers of units with panels made by non-defendants for the rare models that used panels from both defendants and non-defendants.

That was a premise at the time Your Honor certified the class. I heard counsel make no response to the question of why we haven't seen a draft notice. He said nothing about it.

You could not have been clearer at our last hearing that they were to draft a notice, run it by us and bring to the Court. And we were going to discuss it at this hearing. They haven't done it because they can't do it.

And he says that we're manipulating the data. Look at that chart. That is their own evidence. And they take the later years and they want to go back to the earlier years, okay.

Take out the earlier years. And even in the later years, the monitors we're talking about 13.8 percent as late as 2006 involved products that had panels not made by the defendants.

I would represent -- I would urge the Court that whatever you do, we should not be held to a class where you've

got percentages in anything above 5 percent. That's just not close enough. And he says, well, it's 90 percent likely, was the phrase he used. "90 percent likely."

We're talking about hundreds of millions of dollars for that 10 percent that he's representing to the Court, based on no evidence that he's representing to the Court.

Metzler is expert testimony. We've not been able to take his deposition. He's not provided an expert report. It's simply not adequate.

For him to say, well, we've pled guilty and, therefore, it's just too bad that we need to come forward, that's not the law. It is their burden.

And on this averaging thing they are confusing damages with impact. They have to show an impact on every class member. That's the rulings of the courts.

Now, once they show the impact, the courts disagree as to how much latitude will be given to the plaintiffs in showing damages. I understand that. That's not unique to an antitrust case.

I mean, there's -- concepts of damages often can get a little bit looser. But the law is clear that they need to show impact.

In my judgment, Your Honor, I would submit to the Court that they have not done what they expressly told Your Honor they would do and on which you relied.

They have not answered the questions of ascertainability. They have not provided a notice. And Dr. Netz's and the other experts' models are inadequate.

I may have misspoken, and I apologize, when I said that Dr. Netz's testimony was excluded. It was not excluded on a Daubert motion. It was rejected even before we got to a Daubert motion by the two courts who found that her model was not an adequate basis for class certification. And class certification was denied on that basis.

Thank you.

THE COURT: Thank you.

Now, did you want to be heard on the second motion?

MR. CORBITT: Could I just respond on the notice points, Your Honor?

THE COURT: Very briefly.

MR. CORBITT: As Your Honor, I think, is aware, we have settlements with six out of the nine defendants or defendant groups. I know it has been a long process.

THE COURT: Yes.

MR. CORBITT: I think we are almost there. I understand that three of those six agreements are fully signed and ready to go. There are a couple of issues we're working out with the others, but we expect to be there very soon. And --

THE COURT: Any idea when "very soon" is?

MR. CORBITT: You know, it's one of those things I keep thinking it's going to be the day after tomorrow, and it turns out ... so I hesitate to give an exact date.

Mr. Cooper is here, who has been dealing with some of these issues more directly. Perhaps he or Mr. Alioto would have an estimate.

MR. COOPER: Your Honor, Josef Cooper on behalf of the indirect purchaser plaintiffs.

We have assumed internally that we had to get the documents with regard to preliminary approval and notice to you before -- the deadline would be, basically, the 23rd December, before the Christmas break, in order to provide an opportunity for people who might want to comment on the documents and for Your Honor to consider during the month of January.

So that's the schedule we've been having. We had hoped to do it sooner, but we have multiple sets of defense lawyers, we have eight Attorneys General, everyone looking at the same documents, with different comments.

It just sometimes gets to be a little chaotic in trying to keep it all straight. But we have internally set a deadline of getting the documents filed before the Christmas break.

And we understand Your Honor is out, based on the posting on the website, during the week between Christmas and new years but would be back in January, and then we would be

asking Your Honor for a hearing date in mid/second half of January.

We have a notice plan and schedule which requires that we tell Kinsella, the people who have also handled the notice by the direct purchaser, by February 1st that they can proceed with placing the ads and getting the notice out in order to have the notice program and the opt-out period conclude before the trial date of April 23rd.

THE COURT: You said you expect to file by December 23rd?

MR. COOPER: Yes.

THE COURT: Thank you.

MR. COOPER: Thank you, Your Honor.

MR. HARROP: Your Honor, this is Blake Harrop, from the State of Illinois.

I just wanted to clarify Mr. Cooper's comments that when he refers to eight state AGs looking at those papers, that Illinois is not one of those states that has been given a chance to do that. And I don't think that Washington has either.

I want to make sure it's clear on the record.

MR. COOPER: It's the eight states, Your Honor, who are participating in the settlements.

Mr. Miller from California is here today, if you need --

THE COURT: Let me ask a different question then.

Have you presented these papers or the documents to Illinois and Washington State?

MR. COOPER: We have not presented the documents to them. We would like to get them in the form we're presenting to the Court, and then they will have an opportunity before they would come before Your Honor to comment.

They have made, of course, certain comments already with regard --

THE COURT: Well, they've made motions. And I've been putting the motions off until you get me the papers on the settlements --

MR. COOPER: Right.

THE COURT: -- in the expectation that perhaps some of these issues would be resolved.

Are you suggesting they are not going to be?

MR. COOPER: I'm not certain that they will all be resolved, Your Honor. I think some have been. But I'm expecting that they will have additional comments.

THE COURT: Okay.

MR. COOPER: Or the same comments stated again.

THE COURT: Okay. All right. Well, thank you, Counsel, for making that distinction because it's an important one, and now I appreciate what's going on.

MR. COOPER: Thank you.

THE COURT: Thank you.

MR. COOPER: Thank you, Your Honor.

THE COURT: Okay. Very briefly, do you wish to address the second motion --

MR. CORBITT: Yes.

THE COURT: -- re definition?

MR. CORBITT: Yes, Your Honor.

We just don't see why it's necessary to essentially double the size of the class definition by --

THE COURT: Let me tell you, by the way -- and I should say this first, and I want to hear from defense if there's an issue with this. I felt that the articulation of the amended parameters was cumbersome. So my articulation would be as follows, instead of what the defendants have proposed.

It would be all persons and entities in like state who from January 1, '99 to December 31, 2006, as residents of the state, purchased LCD panels incorporated in televisions, monitors and/or laptop computers in the state -- and now here comes a change -- primarily for personal, family, or household purposes, indirectly from one or more of the named defendants for Quanta Display, Inc. for their own use and not for resale -- here's the change -- except for persons who fall within the definition of the certified direct purchaser class in this Multi District Litigation 1827, and did not opt out of

that class.

So it's, essentially, the same thing as the defense had wanted, but it's less long than what they had said.

So, anyway, with that comment, I'll be happy to hear from you.

MR. CORBITT: Well, one question, Your Honor. Perhaps I misheard you, but you had the phrase "for personal, family or household" --

THE COURT: Right.

MR. CORBITT: -- "usage," which I think for a couple of the states, Rhode Island and Missouri, I think Your Honor's determined that that's -- that that's appropriate. And I'm not here today to argue that. But the class itself contains many, many end user businesses.

The indirect purchasers are not just household consumers. They are companies like Bank of America, Wells Fargo. You know, big companies. And that, actually, is the basis of my concern about this motion.

And the second point I wanted to make in addition to the somewhat convoluted formulation the defendants had, which is, I don't know whether it's the case that Bank of America, just to take an example, bought $10,000 worth of product directly and will submit a claim form in the direct purchaser settlement to be paid as a basis of that.

THE COURT: Well, you know, I apologize, Mr. Corbitt.

I misled you and the defense as well. The "primarily for family or household purposes" I would only put in the Missouri and Rhode Island definitions.

MR. CORBITT: Okay. Thanks.

But my point would be, Your Honor, the defendants are not at any risk of duplicative purchases.

We think that a company like Bank of America or anybody, if it's a consumer, conceivably, who bought from Samsung.com and went to Best Buy and bought something else, so they are in both classes, it's a separate injury. They are in both classes, a separate purchase. They ought to be able to recover for both.

And we have the same claims administrator, Rust Consulting, that we intend to use here, the same website we intend to use here. And it would not be a difficult matter to sort this out and have one check for the direct class and one check for the indirect class. We think that's how it ought to be done.

I recognize that the releases in the direct purchaser settlements are very broad, as is typical in these cases. But, by the same token, I would submit that the direct co-lead counsel were appointed to represent the direct purchasers, and we were appointed to represent the indirect purchasers. And we don't like to see, potentially, a lot of the money not going to members of our class simply because there may be some confusion

that they are releasing the right to recover from our class as well.

So, that was the basis for our opposition to the motion.

THE COURT: Thank you.

Well, that will be submitted. I don't think I need to hear anything further from the defense on that.

MR. CURRAN: Your Honor, this will just take a moment.

Christopher Curran for the Toshiba entities. I would just like to close the loop on an issue that you and I had had an exchange on when I was before Your Honor last month. It relates to the Toshiba depositions and whether there are Fifth Amendment issues.

We have now had an exchange with the Department of Justice, at your request at the last hearing, and we have received definitive word that there will not be any charges against Toshiba or any of Toshiba people. So, the Toshiba depositions are going forward promptly.

THE COURT: Good. All right.

MR. CURRAN: Thank you.

THE COURT: Thank you.

Anything else?

MR. SIMON: Your Honor, this is Bruce Simon on behalf of the direct purchasers.

They are not all going forward. Some of them are starting tomorrow, Saturday. Two of the witnesses have refused to revoke, despite the definitive statement that counsel represents that he got.

Those are Caperton and Hertweck. And we might have a dispute with the special master about how we handle this issue. So if he got definitive word, I'm not sure why two people are not revoking.

MR. CURRAN: Maybe this isn't as brief as I thought, Your Honor.

But the two people Mr. Simon is referring to are not affiliated with Toshiba. They are former employees who also worked at other companies. We are still working on that.

The statute of limitations just expired as to Toshiba yesterday. So these people now have the comfort they should need.

Our position, of course, is they don't have a Fifth Amendment right anymore, if there's been definitive word from DOJ. So if they take a little more convincing, so be it.

I actually think that Mr. Hertweck, one of the people involved, has agreed to waive -- to revoke the invocation of the Fifth Amendment and will be testifying.

The other, Ms. Caperton, I don't have word from. But, as I say, give me a little more time on that.

THE COURT: All right. Well, at least one issue has

been resolved, which is that Toshiba, the statute has run on Toshiba.

MR. CURRAN: That's right.

THE COURT: So this will all work out in the performance of time --

MR. CURRAN: I think so.

THE COURT: -- I'm confident.

All right. Mr. Alioto.

MR. ALIOTO: You'll see how brief it is, Your Honor. They included in this motion the motion to bifurcate.

THE COURT: Who included --

MR. ALIOTO: The defendants, the defendants included in the motions that were on for hearing today, a motion to bifurcate. They didn't even cite 42(d). They didn't cite any of the reasons that would ordinarily accompany 42(d). So we submit that it should be summarily denied.

THE COURT: Okay. Thank you.

MR. ALIOTO: Thank you.

THE COURT: All right. Thank you very much. The matter is submitted.

MR. CORBITT: Thank you, Your Honor.

(At 10:04 a.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, December 16, 2011

s/b Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter